Jurisdictional Statement

Office Supreme Court, U.S.
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81-639

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

Lawrence Regira, et al.,
Appellants

v.

Ralph Falsetta, et al.,
Appellees

On Appeal from the Supreme Court of Louisiana

Jurisdictional Statement

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Questions Presented

Did the Louisiana Supreme Court and the inferior Courts of Louisiana fail to apply the proper standard in determining whether the Louisiana Election Code provisions here in question were constitutional under the United States Constitution?

Did the Louisiana Supreme Court err in upholding the constitutionality of that portion of the Louisiana Election Code which allows the termination of the election process in the event that one candidate in the general election dies?

Did the Louisiana Supreme Court err in upholding the constitutionality of the Louisiana Election Code which deny

petitioners and others similarly situated equal protection and due process by denying them the right to vote?

Parties to the Proceedings Below

The parties to the proceeding in the Louisiana Supreme Court and the inferior Courts of Louisiana were Lawrence Regira, Jr., Mrs. Lawrence Regira, Dennis Burns, Janet Regira Burns, Wilbert Huey, Mildred Dorsey, Dorothy M. Williams, Robert Johnson, William E. LeBlanc, Michael McKinney, Vic Marcello, Emerson Taylor, Lawrence Chatman, Jr., Delores Wright, Eunice Mumford, Mary Agnes Dorsey, Stanford Knockum, and Vincent "Cy" Tortorich, Appelants herein, and Ralph Falsetta, The Honorable Jim Brown, Secretary of State of the State of Louisiana, The Board of Supervisors of Elections of the Parish of Ascension, The

Honorable William Guste, Attorney General of the State of Louisiana, and the Honorable David Treen, Governor of the State of Louisiana, Appellees herein.

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Citation to Opinions Below

The opinions of the Louisiana Supreme Court, Court of Appeals and District Court are annexed as Appendix A, B and C respectively. At the time of the filing of this Jurisdictional Statement none of these opinions have been officially reported.

Jurisdiction

The jurisdiction of this Court is founded on Title 28, United States Code, Section 1257(2). The following decisions sustain jurisdiction of the Court to review the judgment of the Louisiana Supreme Court. Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 61, N. 3 (1963); Dahnke-Walker Milling Co. v. Bondurant,

257 U.S. 282, 288-90 (1921). The final decision of the Louisiana Supreme Court denying a rehearing was rendered on June 12, 1981 and notice of appeal to this Court was filed on June 17, 1981 as shown by the annexed notice as Appendix D.

Constitutional Provisions Involved

United States Constitution, Article 4, Section 4 and Amendment XIV, as set forth in Appendix E.

Statutory Provisions Involved

Louisiana Revised Statutes, Title 18, Section 512 B:

> B. Election of unopposed candidates. If, as a result of the death or withdrawal of one or more candidates, the number of candidates for an office in a general election does not exceed the number of persons to be elected to the office, the remaining candidates are declared elected by the people, and their

names shall not appear on the ballot in the general election.

STATEMENT OF THE CASE

Appellees herein are all registered voters in the City of Donaldsonville, Louisiana who allege that they have been denied the right to vote for the office of mayor of the city. The election process in Louisiana is favored over appointment in every instance except in the event of death of a candidate as shown in La. R.S. 18:512 B, supra.

On April 4, 1981 four candidates presented themselves for election to the office of mayor of the City of Donaldsonville. According to law the two candidates receiving the highest number of votes advanced to a "general or run-off election" which was scheduled for

May 16, 1981. On or about May 2, 1981, candidate Lawrence Regira died.

Under the provisions of La. R.S. 512 B, the Honorable James Brown, Secretary of State, declared the remaining candidate "elected by the people," although no election had been held, for the term commencing July 1, 1981.

Thereafter suit was filed by the appellees seeking a declaration of unconstitutionality of the state law here in question on both federal and state constitutional grounds. The equal protection and due process provisions of both constitutions have been subject to the same or similar analysis with respect to the standard of scrutiny and

review which is to be applied.

Appellees argued at every level that the nature of the right in question, the right to vote, is fundamental and that properly brought, an action requires a standard of scrutiny that when the right to vote is denied, imposes on the state the burden of showing a "compelling state interest" in adopting a system or procedure which would deny the right to vote to qualified electors. See Kramer v. Union Free School District, 395 U.S. 621, 89 S. Ct. 1886 (1969); Loving v. Virginia, 388 U.S. 1, 87 S. Ct. 1817 (1967).

The test as articulated in this Court is,

> "If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties."

Shelton v. Tucker, 364 U.S. 479, 488, 81 S. Ct. 247 (1960).

Here the State has made no showing that it has a compelling interest in such a system which denies the right to vote to the city's electors.

The Louisiana state courts have refused to apply the requesit standard of review in this case.

The Questions Presented Are Substantial

I.

This case presents the important question of whether the right to vote can be impaired by state law in the manner allowed by the statute here in question when there exists no compelling state interest for foreshortening the election process. If indeed a compelling state economic interest could be shown, the question here raised is why is there such an economy in the election process at the time of a general election while there exists no economic interest in the process at any other stage.

It is submitted that the "election" of a candidate in Louisiana can only take place in the fashion it did only in the

circumstances which are here presented. All other elective officials on both the state and local level may claim office only when elected by the people. If Mr. Regira had died at any time during the "open primary" prior to the official promulgation of the election results, the entire process would have been reopened. If he had died after being elected, a new election would be held. If he had died after taking office a new election would have been held. Thus the state has recognized the fundamental right of the electors to elect their public officials by the actual casting of votes.

This Court has not yet decided the issue here presented while it has recognized the fundamental nature of the right to vote and the function that that right serves in our system of government.

II.

The standard of review to be applied in this case imposes on the state the burden of showing a "compelling state interest" in adopting a system or procedure which would deny the right to vote to qualified electors. See Kramer v. Union Free School District, 395 U.S. 621, (1969). That standard has not here been applied by the Courts below. The trial court in examining the cited jurisprudence noted that previous decisions

of this Court were founded on a denial of the right to vote based on either race, ownership of property or the payment of poll tax, it said:

The court has read all of the authorities cited and find that while persuasive, in that they do indeed deal with the general principle that statutes dealing with fundamental rights will be strictly scrutinized and must pass the test of compelling state interest, they are not controlling in that none are concerned expressly with the constitutional guarantee of the vote. For example, Smith V. Allwright, 321 U.S. 649, 88 L. Ed 987, 64 S.Ct. 757 (1944), concerned denial of voting

rights because of race; Kramer v. Union Free School District No. 15, 395 U.S. 621, 23 L. Ed. 2d 583, 89 S.Ct. 1886 (1969) concerned laws requiring property ownership and parentage as qualifications for voting; Harper v. Virginia Board of Elections, 383 U.S. 663, 16 L. Ed. 2d 169, 86 S.Ct. 1079 (1966), declared invalid a poll tax requirement; and Cipriano v. Houma, 395 U.S. 701, 23 L. Ed. 2d 647, 89 S.Ct. (sic) 1897 (1969), declared invalid a property taxpayer requirement as a voter qualification.

Here the question is even more fundamental than the invidious discriminatory devices utilized in the past. Here the election process itself is terminated

on an irrational and unnecessary basis because of the death of a candidate thus depriving the electorate of the chance of expressing a choice at all in the process. It is the failure of allowing an election at all that is constitutionally offensive. Thus Fortson v. Morris, 385 U.S. 231 (1966) and Gordon v. Lance, 403 U.S. 1 (1971) may be distinguished because in both cases the people acting as the electorate had expressed an electoral will by voting though in each case an alternative means to a majority was required.

Justice Blanche of the Louisiana Supreme Court correctly summarized the questions here presented when he dessented from the denial of appeal in

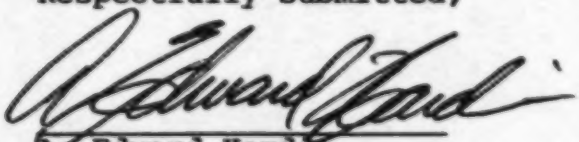
the Louisiana Supreme Court:

Blanche, J., would grant as to the election contest. The remaining candidate will be elected by less than 1/3 of the voters. No compelling state interest is shown so as to require such a result. Cancelling the election and certifying one who did not receive a majority vote violates the constitutional right to vote and thwarts the electoral process by making election dependent on the death of one's opponent rather than on receiving a majority vote.

Conclusion

The questions presented by this appeal are substantial and require consideration by the Court for their resolution.

Respectfully submitted,



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APPENDIX A

The Supreme Court of the State of Louisiana

LAWRENCE REGIRA, JR., ET ALS

VERSUS NO. 81-CA-1337

RALPH FALSETTA, ET ALS

In re: Lawrence Regira, Jr., et als, Applying for Appeal, and Writs of Certiorari, Mandamus and Review, No. 29,053, Parish of Ascension.

May 28, 1981

Granted in part and denied in part. The holding (in the concurring opinion) that R.S. 18:1409(H) is unconstitutional is reversed. See Carrere v. Castano and Lombard, No. 81-CC-0618, March 9, 1981. Otherwise, the writ is denied.

JAD

PFC

WFM

JCW

Lemmon, J., concurs in the denial of this application.

Blanche, J., would grant as to the election contest. The remaining candidate will be elected by less than 1/3 of the voters. No compelling state interest is shown so as to require such a result. Cancelling the election and certifying one who did not receive a majority vote violates the constitutional right to vote and thwarts the electoral process by making election dependent on the death of one's opponent rather than on receiving a majority vote.

Dennis, J., would grant fully.

Supreme Court of Louisiana
May 28, 1981

s/Frans J. Labranche
Clerk of Court
For the Court

The Supreme Court of the State of Louisiana

LAWRENCE REGIRA, JR., ET ALS

VERSUS NO. 81-CA-1337

RALPH FALSETTA, ET ALS

Re: Lawrence Regira, Jr., et als, applying for Reconsideration of a Writ Granted in Part and Denied in Part on May 28, 1981, Parish of Ascension, Number 29,053.

June 12, 1981.

Denied.

JCN
JAD
PFC
WFM
HTL

Blanche, J., would grant the writ.

Supreme Court of Louisiana
June 12, 1981

s/Frans J. Labranche
Clerk of Court
For the Court

Supreme Court of Louisiana
New Orleans, 70112

LAWRENCE REGIRA, JR., ET ALS

VS NO. 81-CA-1337

RALPH FALSETTA, ET ALS

In Re: Lawrence Regira, Jr., et als, applying for Motion for Stay of Court's Judgment and Request for Writ of Prohibition, Parish of Ascension, No. 29,053.

June 26, 1981.

Denied.

/s/ JAD

/s/ PFC

/s/ WFM

/s/ JCN

SUPREME COURT OF LOUISIANA
June 26, 1981

s/Dan Haggerty
Deputy Clerk of Court
For the Court

APPENDIX B

LAWRENCE REGIRA, ET ALS NUMBER: 14,601

VS. COURT OF APPEAL

RALPH FALSETTA, ET ALS FIRST CIRCUIT

STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-THIRD JUDICIAL DISTRICT COURT, PARISH OF ASCENSION, STATE OF LOUISIANA, HONORABLE PAUL B. LANDRY, JR., JUDGE PRO TEMPORE

BEFORE: ELLIS, COVINGTON, LOTTINGER, CHAISSON, EDWARDS, PONDER, LEAR, COLE, AND WATKINS, JJ., EN BANC

PER CURIAM:

This is an election case in which one of the candidates for Mayor of the City of Donaldsonville, Louisiana, died after the primary election, leaving only one other candidate, the Honorable Ralph Falsetta, whom the Secretary of State intends to certify to the Governor as elected Mayor pursuant to the provisions of LSA-R.S. 18:512B.

Plaintiffs, in the trial court and in this court, contend that the aforesaid statute is unconstitutional and therefore ask for various remedies.

After considering the factual matters, which were stipulated by the parties, the trial judge found the subject statute to be constitutional.

We have read the record and thoroughly researched the matter. The trial judge is correct. His exhaustive, excellent reasons for Judgment, attached hereto as Appendix A, are correct and we adopt them as our own.

Also, see Vining v. Democratic Executive Committee for the 32nd Representative District, 204 So. 2d 801 (La. App. 2nd Cir. 1967), writ refused, 251 La. 678, 205 So. 2d 442 (1967).

The judgment is affirmed at appellants' cost.

AFFIRMED.

APPENDIX C

LAWRENCE REGIRA, ET ALS	:	23RD JUDICIAL
	:	DISTRICT COURT
VS	:	PARISH OF ASCENSION
	:	
RALPH FALSETTA, ET ALS	:	STATE OF LOUISIANA
	:	
	:	NUMBER_____
	:	

J U D G M E N T:

This is an election contest in which plaintiffs assert constitutional grounds for challenging the alleged election of defendant Ralph Falsetta, as Mayor, City of Donaldsonville, pursuant to a primary election held April 4, 1981. Falsetta and certain state officials assert and proclaim Falsetta's election although no candidate in the primary obtained a majority vote and no general election has been held to fill the office for the ensuing term commencing July 1, 1981.

Four candidates participated in the primary election, receiving votes as follows:

Lawrence "LaLa" Regira, incumbent and candidate for re-election, 1299; defendant Ralph Falsetta 1040; Glynn "Sonny" Long, 670; and, Dr. D.C. Foti, 454. Falsetta and Regira were accordingly certified to participate in a general run-off election to be held May 16, 1981. On May 2, 1981, the incumbent, Regira, died, leaving Falsetta as the unopposed candidate in the pending general election. Following Regira's demise, Falsetta has claimed election which claim has been confirmed by the Hon. James H. Brown, Secretary of State, State of Louisiana, who, pursuant to LA-R.S. 18:512B has issued ballots for the general election listing no candidates for the office in question. By letter dated May 1, 1981, the Secretary of State has indicated his intent to certify to the Governor, within 30 days of the scheduled general election, the name of defendant Falsetta as elected Mayor by the people pursuant to

LA-R.S. 18:512B, for the ensuing term commencing July 1, 1981.

Plaintiffs Lawrence Regira, Jr., Mrs. Lawrence Regira, Dennis Burns, Janet Regira Burns, Wilbert Huey, Mildred Dorsey, Dorothy M. Williams, Robert Johnson, William E. LeBlanc, Michael McKinney, Vic Marcello, Emerson Taylor, Lawrence Chatman, Jr., Delores Wright, Eunice Mumford, Mary Agnes Dorsey, Stanford Knockum and Vincent "Cy" Tortorich, assert a class action which was abandoned at the start of the trial. Alternatively, they appear in their individual capacities as residents of Donaldsonville and registered voters qualified to vote for the office of Mayor.

Named defendants are: (1) Ralph Falsetta; (2) The Hon. James H. Brown, Secretary of State, State of Louisiana; (3) The Board of Supervisors of Elections of Ascension Parish; (4) The Hon. William Guste, Attorney General, State of Louisiana, and (5) The Hon. David Treen, Governor

of Louisiana.

Plaintiffs pray: (1) That the Secretary of State be restrained from certifying defendant Falsetta to be the elected Mayor of Donaldsonville; (2) That the Attorney General be served herein; (3) That a writ of quo warranto issue directing defendant Falsetta to show by what authority he claims the office of Mayor; (4) That preliminary and permanent injunctions issue restraining and prohibiting the Secretary of State, State of Louisiana, from declaring and certifying Falsetta to be Mayor of Donaldsonville; (5) That a writ of mandamus issue directing the Secretary of State to withhold certification of defendant Falsetta as the elected Mayor of Donaldsonville; (6) That mandamus issue directing Governor Treen to call a special election pursuant to law to fill the alleged vacancy in the office of Mayor of Donaldsonville; (7) That mandamus issue directing defendant Board of Election Supervisors to

perform the duties incumbent upon for the conduct of the special election; (8) That declaratory judgment issue in favor of plaintiffs declaring LA-R.S. 18:512B unconstitutional; and, (9) That the request for preliminary and permanent injunctions be consolidated.

Plaintiffs challenge is based solely on the ground that Section 512B, above, pursuant to which the Secretary of State proposes to certify Falsetta as Mayor, is violative of the Fourteenth (due process and equal protection clauses) amendment to the United States Constitution, and Louisiana Constitution Article 1, Section 2 (due process), Section 3, (equal protection); and, Section 10 (the right to vote).

Plaintiffs argue that the constitutionally guaranteed right to vote is the cornerstone of our democracy and so vital to the continued existence of our form of government that any infringement or restriction thereof must be

subjected to strictest scrutiny. It is also urged that any legislative regulation or restriction on this right must be predicated on a compelling interest embodied therein. According to plaintiffs, the nature of the election process is primarily the presentation of a choice to the voters in every phase of the election procedure. To this end, plaintiffs argue, Louisiana has adopted a two election system of primary and general elections, thus eliminating the former antiquated system which frequently resulted in three elections when it became necessary to choose party candidates because a party candidate was not chosen in a first primary election.

Plaintiffs note that LA-R.S. 18:469 provides for reopening of qualification for office if a candidate dies before a primary election in that the statute provides:

When a person who qualified as candidate in a primary election for a public office dies after the close of the qualifying period and before the time for closing the polls on the day of the primary election, the qualifying period for candidates in the primary election for that office shall reopen for candidates on the day after the death and shall close at 5:00 p.m. on the third day after the death or, if that day is a legal holiday, at 5:00 p.m. on the next day which is not a legal holiday. The name of the deceased candidate shall not be printed on the primary election ballot. If the primary election ballot was

printed with the deceased candidate's name on it, any votes received by the deceased candidate shall be void.

LA-R.S. 18:469D pertinently states:

D. Effect on primary elections. If the qualifying period for candidates reopens within thirty days before a primary election, all the votes cast in the primary election for that public office are void, unless the qualifying period opened and closed without additional candidates qualifying for that office. If all the votes cast in a primary election for a public office are void because of the death of a candidate, the primary election for the office shall be held on the date of the general election, and the general election for the office shall be held on the sixth Saturday after the primary election.

Plaintiffs note that LA-R.S. 18:512B, makes no similar provision for reopening qualifying time when a candidate participating in a general election dies or withdraws, but, instead, provides as follows:

> Election of unopposed candidates. If as a result of the death or withdrawal of one or more candidates, the number of candidates for an office in a general election does not exceed the number of persons to be elected to the office, the remaining candidates are declared elected by the people, and their names shall not appear on the ballot in the general election. (Emphasis by the Court).

Plaintiffs maintain that Section 469, above, serves the best interests of the state and its electors by providing an orderly and economical election process in primary elections by establishing a procedure in which the

electorate participates at every stage and establishes a reasonable and fair process which should logically apply to general elections as well. Section 512B, above, according to plaintiffs is fundamentally unfair, contrary to the principle of free and open elections and violative of the concept of majority rule in that it denies and infringes upon the right of the electorate to choose public officials. Plaintiffs place considerable stress upon the fact that more than two-thirds of those voting in the primary election here involved, did not vote for defendant Falsetta. Consequently, it is argued that if applied herein, Section 512B, above, vitiates the will of two-thirds of those voting in the primary, thus producing an unfair and unjust result.

Defendants have filed exceptions of no right and no cause of action alleging plaintiffs' lack of capacity to institute and individual action and asserting that as a matter of law

no remedy is available to plaintiffs herein. Defendants also assert plaintiffs right to institute an action of quo warranto because plaintiffs are not claiming the office involved. A plea of prescription if also advanced on the provisions of LA-R.S. 18:512B. The Governor, Secretary of State, and Attorney General have filed an exception to the venue on the ground that proper venue after them is East Baton Rouge Parish.

On the merits, defendants allege that plaintiffs erroneously contend that the right to vote is the primary issue herein. Rather, according to defendants, the issue is simply the method of selection of candidates for office therefore the constitutional inquiry is reasonableness of legislative action, not the compelling interest criteria as contended by plaintiffs. Defendants also note that the burden of showing unreasonableness rests upon plaintiffs. Finally, defendants argue that subject statute is a valid exercise of legislative

authority and discretion and therefore invulnerable to successful attack on constitutional grounds.

THE EXCEPTION OF VENUE

The court finds no merit in this exception. This is not an action against the Governor, Secretary of State and Attorney General or any combination of said officials alone. The suit is also against defendant Falsetta, a resident of Ascension Parish and the Board of Supervisors of Elections of Ascension Parish. The proper venue as against these later parties is Ascension Parish. The court holds, therefore, that under the circumstances the Governor, Attorney General and Secretary of State, as indispensible parties to this action, are properly before the court.

THE EXCEPTIONS OF NO RIGHT
AND NO CAUSE OF ACTION

In general the right to an individual action in an election contest suit is governed

by LA-R.S. 18:1401C which states:

> C. A person in interest may bring an action contesting any election in which any proposition is submitted to the voters if he alleges that except for irregularities or fraud in the conduct of an election the result would have been different.

Notwithstanding the apparent restrictive scope of Section 1401C, above, our jurisprudence recognizes the right of a citizen, taxpayer and voter not a candidate for office, to challenge implementation of the election process. Baker vs. Democratic Central Committee of Louisiana., 262 La. 1033, 266 So. 2d 199 (1970).

This court cannot conceive that the legislature intended to preclude the right of an interested voter to challenge the election process on constitutional grounds. Such legislation, in the view of this court would itself be unconstitutional. The court holds therefore that plaintiffs have, as individual taxpayers and voters, a right and cause of action herein.

PRESCRIPTION

Defendants maintain the action is prescribed because it was not instituted within five days of the date of Regira's death. Pertinent are the provisions of LA-R.S. 18:1405B which states:

> B. An action contesting any election involving election to office shall be instituted within five days after the date of the election, and no such contest shall be declared moot because of the performance or nonperformance of a ministerial function, including but not limited to matters relating to the printing of ballots for the general election.

Plaintiffs reason that since Falsetta's alleged "election" is predicated on Section 512B, above, the "election" took place on May 2, 1981, the date of Regira's death, and this action having been brought May 12, 1981, is untimely.

The court rejects this argument upon finding that the intent of Section 512B, above, is apparently that the date of election envisioned therein

is the date on which the Secretary of State certifies to the Governor the name of the surviving general election candidate within thirty days of the date of the scheduled general election. Since no such certification has yet been made, the prescriptive period has not commenced and therefore could not prescribe.

QUO WARRANTO

The purpose of a writ of quo warranto is to test the authority of one holding office or of an intruder attempting to exercise the power and authority of an office. LA-RS 42:76; LA-CCP Article 3901. Lelong v. Sutherland, 134 So. 2d 627 (La. App. 4th Cir. 1961).

A party appearing solely in an individual capacity and not as claimant to public office has no standing to invoke quo warranto proceedings. Small v. Levy, 355 So. 2d 643, La. App. 4th Cir. 1978), writ denied May 5, 1978, to the same effect see Lelong, above.

Since plaintiffs do not claim the office in question, the application for writ of quo warranto is denied.

CONSTITUTIONALITY

In support of the claim of unconstitutionality, plaintiffs cite numerous cases dealing with fundamental rights (due process and equal protection), in which area the United States Supreme Court has repeatedly held there can be no discrimination or distinction except that predicated upon some "compelling" state reason and that all statutes of this nature are held to strictest scrutiny to insure no such protected rights are violated. It is contended this same rule of interpretation applies to the fundamental right to vote. It is then argued that the legislature has recognized the fundamental nature of the right of franchise and right of the people to elect officials by providing in Section 469, above, that qualifying shall be reopened if a candidate dies within 30 days of the date of a

primary election. To fully implement and preserve the franchise, it is argued that the same provision should apply to general elections. According to plaintiffs, Section 512B, is not only contrary to the legislatively expressed intent of our Election Code as a whole, but also offends on the stated constitutional grounds.

The court has read all of the authorities cited and find that while persuasive, in that they do indeed deal with the general principle that statutes dealing with fundamental rights will be strictly scrutinized and must pass the test of compelling state interest, they are not controlling in that none are concerned expressly with the constitutional guarantee of the vote. For example, Smith v. Allwright, 321 U.S. 649, 88 L. Ed 987, 64 S. Ct. 757 (1944), concerned denial of voting rights because of race; Kramer v. Union Free School District No. 15, 395 U.S. 621, 23 L. Ed. 2d 583, 89 S. Ct. 1886 (1969) concerned laws requiring property ownership and

parentage as qualifications for voting; Harper v. Virginia Board of Elections, 383 U.S. 663, 16 L. Ed. 2d 169, 86 S. Ct. 1079 (1966), declared invalid a poll tax requirement; and Cipriano v. Houma, 395 U.S. 701, 23 L. Ed. 2d 647, 89 S. Ct. 1897 (1969), declared invalid a property taxpayer requirement as a voter qualification.

No authority has been cited in support of plaintiff's contention that subject statute infringes upon the right to vote as guaranteed in Article 1, Section 10 of the Louisiana Constitution. That is, no authority directly in point, has been cited on the issue and this court has been unable to find such a precedent.

In contending that the issue here is candidate selection, and not the right to vote as contended by plaintiffs, defendants rely primarily upon the provisions of our Election Code and Fortson v. Morris, 385 U.S. 231, 17 L. Ed. 2d 330, 87 S. Ct. 446 (1966), which involved a constitutional assault on provision of the Georgia Constitution whereby the Governor of that state

should be selected by majority vote in a general election and alternatively, by the state's legislature choosing between the two candidates having the most votes in the event no candidate received a majority vote. The Supreme Court held that while election by majority vote is preferred, the alternative method provided by the Georgia Constitution was not invalid and noted:

> It set up two ways to select the Governor. The first and preferred one, was election by a majority of the people; the second, and alternative one, was election by the State Assembly if any one candidate failed to receive a majority of the popular vote. Under the second method, in the legislative election the votes of the people were not to be disregarded but the State Assembly was to consider them as in effect nominating

votes and to limit itself to choosing between the two persons on whom the people had bestowed the highest number of votes. There is no provision of the United States Constitution or any of its amendments which either expressly or impliedly dictates the method a State must use to select its Governor. A method which would be valid if initially employed is equally valid when employed as an alternative. It would be surprising to conclude that, after a state has already held two primaries and one general election to try to elect by a majority, the United States Constitution compels it to continue to hold elections in a futile effort to obtain a majority for some particular candidate.

Fortson, above, noted that Mississippi and Vermont also provide for election of their Governors in the same manner as Georgia. The decision also noted that 38 states provide for gubernatorial election by plurality vote and that in case of a tie the legislature shall elect. Forston, above, concluded that the Georgia Constitutional provision did not violate the equal protection clause of the Federal Constitution.

Gordon v. Lance, 403 U.S. 1, 29 L. Ed. 2d 273, 91 S. Ct. 1889 (1971) followed Fortson, above, and held that a West Virginia provision requiring sixty percent voter approval of a referendum to incur bonded indebtedness or increase tax rates, did not offend constitutional requirements of the fourteenth amendment. In so holding, the Court observed:

> Although West Virginia has not denied any group access to the ballot, it has indeed made it more difficult for some kinds of governmental actions to be taken.

Certainly any departure from strict majority rule gives disproportionate power to the minority. But there is nothing in the language of the Constitution, our history, or our cases that requires that a majority always prevail on every issue. On the contrary, while we have recognized that state officials are normally chosen by a vote of the majority of the electorate, we have found no constitutional barrier to the selection of a Governor by a state legislature, after no candidate received a majority of the popular vote. Fortson v. Morris, 385 U.S. 231, 17 L. Ed. 2d 330, 87 S. Ct. 446 (1966).

In this instance the statute does not result in unequal protection under law in that *some class of voters is discriminated against because of race, poll tax requirement, property ownership or residential requirement. All

persons have the right to vote in every election held pursuant to the Louisiana Election Code.

Nor does the court find any infringement, erosion or denial of the right to vote as contemplated by the appropriate provisions of the constitutions of the United States or this state.

The Election Code provides for a single primary followed by a general election in the event no candidate receives a majority vote in the primary. The required primary has been held in this instance with results necessitating a general election which was properly called. Unfortunately, one of the two candidates entitled to participate in the general election, died before the election was held.

The very nature of elections demand that they be conducted expeditiously with the view of achieving earliest possible finality commensurate with due process of law requirements. The orderly conduct of governmental affairs requires that official succession to public office

be determined, when possible and practicable, prior to commencement of the term for which the election is held.

LA-R.S. 18:1432A provides the remedies which may be ordered in an election contest. It provides that upon finding an election void for reasons authorized therein:

> ---the judge may render a final judgment declaring the election void and ordering a new primary or general election for all the candidates, or, if the judge determines that the appropriate remedy is the calling of a restricted election, the judge may render a final judgment ordering a new election and specifying the date of the election, the appropriate candidates for the election, and the office or other position for which the election shall be held.

Statutes are presumed constitutional and the party alleging unconstitutionality bears the burden of proof. Buras v. Orleans Parish Democratic Executive Committee, 248 La. 203, 177 So. 2d 576 (La. 1965).

It is the duty of the court to uphold constitutionality of a statute whenever possible and every consideration of public need and policy upon which the legislature could rationally have based the statute should be weighed by the court and, if the statute is not clearly arbitrary, unreasonable and capricious it should be upheld as valid. State v. Rones, 223 La. 839, 67 So. 2d 99.

Any doubt concerning alleged unconstitutionality of a statute must be resolved in favor of its validity. Johnson v. Collector of Revenue, 246 La. 540, 165 So. 2d 466.

Application of plaintiff's position to the facts of this case would produce interesting alternative solutions. The election in question is a general election, not a primary. Defendant

Falsetta survived the primary and was entitled to participate in the general election. If a new general election is held, surely Falsetta would be entitled to participate. How would his opponent be selected? Should he face the candidate having the third highest vote in the primary? If so, suppose this candidate declined to run in the general election. Should Falsetta's opponent then be the candidate receiving the fourth highest vote in the primary or should a new primary election be called? If a new primary were ordered delays could be encountered therein by the death or withdrawal of a candidate, thus delaying the general election. If a general election were ordered, the death of a candidate before that election were held, would place matters in the same position as presently exists. This court believes that such eventualities are neither reasonable, practicable nor expeditious.

It is noteworthy that the term of office

involved herein commences July 1, 1981. Holding of any further elections, either general or primary would delay the electee's taking office until after the date of commencement of his term.

In Raborn v. Secretary of State, 204 So. 2d 630 (La. App. 1st Cir. 1967), writ refused December 1, 1967, it was held that, primary for multiple office left more than one person to be elected and one candidate withdrew, the remaining candidate with the highest number of votes was properly declared elected. Raborn, above, is express judicial recognition that a majority vote is not an indispensable prerequisite to election.

Declaring Falsetta elected by the people under the circumstances of this case, in pursuance of Section 512 B, above, is a reasonable exercise of legislative authority and discretion, designed and reasonably calculated to achieve a significant state interest, namely, the orderly expeditious and least costly conduct of elections

for public office. Specifically, in this case it accomplishes timely accession to office which would not otherwise result.

This court finds no infringement of voting rights and holds that plaintiff's attack on Section 512B, above, is without merit.

ACCORDINGLY, IT IS ORDERED, ADJUDGED AND DECREED that the order issued herein May 12, 1981, temporarily restraining the Hon. James Brown, Secretary of State and directing defendants to show cause why a writ of quo warranto should not be granted, be and the same is hereby revoked, cancelled and recalled and plaintiffs action dismissed, with prejudice, at plaintiffs cost.

Judgment read, rendered and signed in open Court at Donaldsonville, Louisiana, this 12 day of May, 1981.

_____

JUDGE, PRO TEM.

IN THE SUPREME COURT

OF THE

STATE OF LOUISIANA

LAWRENCE REGIRA, JR., ET AL, : NUMBER: 81-CA-1337
APPELLANTS

VERSUS :

RALPH FALSETTA, ET AL, :
APPELLEES

Notice of Appeal to the Supreme Court

of the United States

Notice is hereby given that Lawrence Regira, Jr., et al, the appellants in the above captioned matter, hereby appeal to the Supreme Court of the United States from the final decision of the Louisiana Supreme Court entered herein on June 12, 1981 affirming the trial court's judgment.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

s/ A. Edward Hardin

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CERTIFICATE

I hereby certify that a copy of this notice of appeal has been served on all counsel herein by mailing, postage prepaid, this 15 day of June, 1981.

s/ A. Edward Hardin
A. EDWARD HARDIN

Motion to Dismiss or Affirm

Office - Supreme Court, U.S.
FILED
JAN 11 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-639

In The
Supreme Court of the United States

OCTOBER TERM, 1981

LAWRENCE REGIRA, ET AL,
Appellants,

v.

RALPH FALSETTA, ET AL,
Appellee.

On Appeal from the Supreme Court
of Louisiana

BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL

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No. 81-639

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

LAWRENCE REGIRA, ET AL,

Appellants,

V.

RALPH FALSETTA, ET AL,

Appellees.

On Appeal from the Supreme Court
of Louisiana

BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL

Appellees have filed a Motion to Dismiss in response to the direction of the Court. The Motion to Dismiss is based solely on the contention that the case fails to present a substantial federal question.

Appellees contend that because the question at issue is "an election procedure" that there is no substantial question because it does not involve a "infringement of the right to vote . . ."

The question of whether or not election procedures are encompassed in questions of the right to vote has

addressed by this Court as recently as this term in Rodriquez v. Popular Democratic Party, 81-328, in which jurisdiction was noted by the Court on October 13, 1981 as reflected by its journal of proceedings. That case appears to be distinguishable from the instant case only insofar as the party mechanism of Puerto Rico is utilized to defeat the right to vote rather than the law itself which is here challenged.

Appellees argue that there is a legitimate state interest in the finality of elections in the interest in avoidance of undue expense. However, the facts are not consistent with that arguement. As Appellants note in their jurisdictional statement, the provisions of the challenged Louisiana Statute, LSA-R.S. 18:512 (B) where a person can be "elected" without an election itself having taken place. In each and every other instance, the electoral process is invoked for the election of public officials and an election would have been held had the incumbent lived until the election and then died; if any candidate had died during the primary election; if the elected official had died after taking office, a new election would have been held.

Appellees have misplaced their reliance on Fortson v. Morris, 385 U.S. 231, 17 L.Ed. 2d 230, 87 S.Ct. 446 (1966), in that they rely on the language of the Court that the United States Constitution does not dictate the method by which a state is to select its officials.

In Fortson, it should be noted that the electoral process had produced inconclusive results and in the instant case, there has been no election at all.

CONCLUSION

For the foregoing reasons, it is clear that a substantial federally protected constitutional right is at issue and that the Motion to Dismiss for lack of a substantial federal claim should be dismissed.

Respectfully submitted,

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PROOF OF SERVICE

I, A. Edward Hardin, attorney for appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the _____day of January, 1982, I served copies of the foregoing Brief in Opposition to Motion to Dismiss Appeal on:

1. Honorable William J. Guste, Esquire, Attorney General of the State of Louisiana, by mail, postage prepaid, to Post Office Box 44005, Baton Rouge, Louisiana, 70804.

2. Honorable Glynn Long, Esquire, counsel for appellee, Ralph Palsetta, by mail, postage prepaid, to Post Office Box 312, Donaldsonville, Louisiana, 70346.

BY: _____

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Motion to Dismiss or Affirm

2

Office-Supreme Court, U.S.
FILED
DEC 24 1981
ALEXANDER L. STEVAS,
CLERK

No. 81639

In The
Supreme Court of the United States

OCTOBER TERM, 1981

LAWRENCE REGIRA, ET AL.,
Appellants,

v.

RALPH FALSETTA, ET AL.,
Appellees.

On Appeal from the Supreme Court of Louisiana

MOTION TO DISMISS

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CITATIONS

1. Fortson v. Morris, 385 U.S. 231, 17 L. Ed. 2d 230, 87 S. Ct. 446 (1966) 4, 5

2. LSA. R.S. 18:512(B) 2, 3, 4

No. 81639

In The
Supreme Court of the United States

OCTOBER TERM, 1981

LAWRENCE REGIRA, ET AL,

Appellants,

v.

RALPH FALSETTA, ET AL,

Appellees.

On Appeal from the Supreme Court of Louisiana

MOTION TO DISMISS

Defendants-Appellees, JAMES BROWN, SECRETARY OF STATE, STATE OF LOUISIANA, WILLIAM J. GUSTE, JR., ATTORNEY GENERAL, STATE OF LOUISIANA and DAVID C. TREEN, GOVERNOR, STATE OF LOUISIANA, through the undersigned Assistant Attorney General move this Honorable Court, pursuant to Rule 16 of the Rules of this Court, to dismiss the appeal in the above entitled and numbered cause of action for the following reason, to wit: the appellant has failed to raise a substantial federal question in that the appeal erroneously focuses on the right to vote, when in fact, the statute in question governs simply the method of candidate selection and has no affect on that constitutionally protected right.

STATEMENT OF THE CASE

This case has come before this Court as a result of a general election held on May 16, 1981, in Donaldsonville, Louisiana, for the purpose of electing a mayor and other public offices. Prior to this election, a primary election was held where qualified voters were permitted to exercise their privilege of voting on four mayoral candidates.

The candidates for the general election were Lawrence "La La" Regira and Ralph Falsetta. On May 2, 1981, Lawrence Regira died. In conformity with the law (R.S. 18:512B) the Secretary of State printed the ballot for the general election without including the name of the remaining candidate for the office of Mayor of Donaldsonville.

Pursuant to the Secretary of State's printing of the ballot, petitioners filed this action alleging the unconstitutionality of LSA-R.S. 18:512(B) in that it denied petitioners, and others similarly situated, equal protection and due process of law by denying them the right to vote.

The Louisiana Supreme Court upheld the lower courts' declaration sustaining the constitutionality of LSA-R.S. 18:512(B); thereby precipitating the present appeal to this Honorable Court. (Joint Appendix A, B, and C).

Defendants-appellees, pursuant to Rule 16 of the Rules of the United States Supreme Court, now bring this motion to dismiss the appeal on the ground that it presents an unsubstantial Federal Question.

SUMMARY OF ARGUMENT

The issue before this Court is whether or not the election procedure of LSA-R.S. 18:512(B) is constitutional, where the remaining candidate in a general election campaign is declared the winner as a result of the death or withdrawal of the opponent. The answer to this issue is in the affirmative.

The selection procedure of R.S. 18:512(B) is reasonably related to the legitimate state interest of insuring the finality of elections and conserving financial resources that would unnecessarily be expended to repeat the election process. Since the issue of this case does not pertain to the infringement of the right to vote, the proper constitutional scrutiny is the "reasonableness analysis." Under such scrutiny, the statute is constitutional.

Thus, defendants-appellees submit that the question presented on this appeal is an insubstantial federal question requiring the dismissal of the appeal.

ARGUMENTS OF LAW

The instant case does not involve an infringement of the right to vote, as asserted by plaintiffs-appellants. Rather, the statute at issue deals exclusively with the method employed by the State in selecting an official in the absence of any opposition. Louisiana Revised Statute 18:512(B) provides as follows:

> Election of unopposed candidates. If, as a result of the death or withdrawal of one or more candidates, the number of candidates for an office in a general

election does not exceed the number of persons to be elected to the office, the remaining candidates are declared elected by the people, and their names should not appear on the ballot in the general election.

By the terms, the above quoted statute is applicable whenever a successful candidate in the primary election is unopposed in the general election due to the withdrawal or death of his opponent. Clearly, this statute provides simply a method of candidate selection and does not in any way disenfranchise any one particular voter or class of voters. Thus, the instant case is distinguishable from the "right to vote" cases in the same manner as was the statute in *Fortson v. Morris* 385 U.S. 231, 17 L. Ed. 2d 230, 87 S. Ct. 446 (1966). There, as here, the statute did not affect the equal right of "all who participate in the election, to vote and have their votes counted without impairment or dissolution." As the matter at hand does not involve the infringement of the right to vote, or any other constitutionally protected right that would require the court to use the "strict scrutiny" analysis, the proper constitutional scrutiny is the "reasonableness analysis" whereby the State need only show that the statute in question is reasonably related to a legitimate state interest.

In enacting LSA-R.S. 18:512, the people of Louisiana, through their legislature, sought to insure the finality of the election process and to avoid the added time and expense of repeat elections. Additionally, the statute serves as a device to prohibit the manipulation and or prolongation of the election process.

For example, if the statute were not in effect,

whenever one of the two candidates in the general election did not like his chances of success, he could withdraw and require that the whole process be repeated. Thus, the statute negates the possibility of a never ending election process in which deaths and withdrawals could prevent anyone from obtaining certification. To prohibit implementation of the statute at issue would defeat these legitimate state purposes.

In *Fortson*, supra, the court recognized that the United States Constitution does not dictate the method by which a state is to select its officials. Under the terms of the instant statute, the State of Louisiana has adopted a reasonable method by which to select its officials upon the occurance of extraordinary circumstances. As the statute is reasonably related to legitimate state interests and does not, either expressly or impliedly discriminate against any one voter or group of voters, the appellant has not presented the court with a substantial Federal question.

CONCLUSION

The question presented by this appeal is unsubstantial and requires the Court to dismiss this action.

Respectfully submitted,

WILLIAM J. GUSTE, JR.
Attorney General

CHARLES L. PATIN, JR.
Chief, Civil Division
Assistant Attorney General

PROOF OF SERVICE

I, Charles L. Patin, Jr., attorney for appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on _____ day of December, 1981, I served copies of the foregoing motion to dismiss on:

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Appendix A

SUPREME COURT OF LOUISIANA
NEW ORLEANS, 70112

No. 81-CA-1337

LAWRENCE REGIRA, JR., ET ALS

VS

RALPH FALSETTA, ET ALS

In Re: Lawrence Regira, Jr., et als, applying for Motion for Stay of Court's Judgement and Request for Writ of Prohibition, Parish of Ascension, No. 29,053.

June 26, 1981.

Denied.

/s/ JAD
/s/ PFC
/s/ WFM
/s/ JCW

SUPREME COURT OF LOUISIANA
June 26, 1981

/s/ DANIEL B. HAGGERTY, JR.

Clerk of Court
For the Court

THE SUPREME COURT OF
THE STATE OF LOUISIANA

No. 81-CA-1337

LAWRENCE REGIRA, JR., ET ALS

VERSUS

RALPH FALSETTA, ET ALS

Re: Lawrence Regira, Jr., et als, applying for Reconsideration of a Writ Granted in Part and Denied in Part on May 28, 1981, Parish of Ascension, Number 29,053.

June 12, 1981

Denied.

JCW
JAD
PFC
WFM
HTL

Blanche, J., would grant the writ.

Supreme Court of Louisiana
June 12, 1981

/s/ FRANS J. LABRANCHE, JR.

Clerk of Court
For the Court

Appendix B

NUMBER: 14,601

LAWRENCE REGIRA, ET ALS

VS.

RALPH FALSETTA, ET ALS

COURT OF APPEAL

FIRST CIRCUIT

STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-THIRD JUDICIAL DISTRICT COURT, PARISH OF ASCENSION, STATE OF LOUISIANA, HONORABLE PAUL B. LANDRY, JR., JUDGE PRO TEMPORE

BEFORE: ELLIS, COVINGTON, LOTTINGER, CHIASSON, EDWARDS, PONDER, LEAR, COLE, AND WATKINS, JJ., EN BANC

PER CURIAM:

This is an election case in which one of the candidates for Mayor of the City of Donaldsonville, Louisiana, died after the primary election, leaving only one other candidate, the Honorable Ralph Falsetta, whom the Secretary of State intends to certify to the Governor as elected Mayor pursuant to the provisions of LSA-R.S. 18:512B.

Plaintiffs, in the trial court and in this court, contend that the aforesaid statute is unconstitutional and therefore ask for various remedies.

After considering the factual matters, which were stipulated by the parties, the trial judge found the subject statute to be constitutional.

We have read the record and thoroughly researched the matter. The trial judge is correct. His exhaustive, excellent reasons for Judgment, attached hereto as Appendix A, are correct and we adopt them as our own.

Also, see *Vining v. Democratic Executive Committee for the 32nd Representative District*, 204 So.2d 801 (La. App. 2nd Cir. 1967), writ refused, 251 La. 678, 205 So.2d 442 (1967).

The judgment is affirmed at appellants' cost.

AFFIRMED.

NUMBER: 14601

LAWRENCE REGIRA, ET ALS

VERSUS

RALPH FALSETTA, ET ALS

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

LOTTINGER, JUDGE (CONCURRING WITH ADDITIONAL REASONS)

I agreed in the result reached, and now file additional reasons for my conclusion that La. R.S. 18:1409 H, which provides that courts of appeal shall sit *en banc* in election suits, is an unconstitutional infringement by the legislature into the powers granted the judicial branch of government by the Louisiana Constitution of 1974.

Article 2, § 1 of the Louisiana Constitution (1974) provides: "The powers of the government of the state are divided into three separate branches: legislative, executive, and judicial." Section 2 of that article further provides that "no one of these branches, . . ., shall exercise power belonging to either of the others."

The powers granted to the judicial branch are found in Article 5 of the Louisiana Constitution(1974). Article 5, § 8(A) in part states: "each court [of appeal] shall sit in panels of at least three judges selected according to rules adopted by the court." The constitution thus requires that a minimum of three judges of a court of appeal hear each case. Only in Article 5, § 8(B) are the courts of appeal constitutionally mandated to hear cases with more than three judges.

Each court of appeal is constitutionally granted the right to adopt rules for the administration of that court. Article 5, § 12, La. Const.(1974). In appellate courts the administration of the court includes not only the day to day operations of the court, but also the method of selection of judges to sit on a multi judge panel, Art. 5, § 8(A) La. Const.(1974), as well as the number of judges on a panel if greater than three. Needless to say, the rules adopted by the court must not be in conflict with the constitution. However, I find no constitutional provision requiring that these rules shall not be in conflict with law, i.e. statutory law. Therefore, the authority to set the numerical composition of a particular court of appeal panel rests exclusively with that court, and not the legislature.

I know of no constitutional provision or overriding public interest which would allow the legislature to infringe upon the judicial powers of the courts by mandating an *en banc* sitting by the courts of appeal in election suits. As a matter of practicality and in the interest of judicial economy, this court—prior to this case and prior to the enactment of La. R.S. 18:1409 H—heard election suits with panels of five judges. This practice was instituted to avoid rehearings by a five man panel in the event a three man panel's decision fell within the ambit of Article 5, § 8(B) of the Louisiana Constitution(1974).

The general rule in Louisiana is that the constitutionality of a statute cannot be raised for the first time in the appellate court. Summerell v. Phillips, 258 La. 587, 247 So.2d 542(1971). However, I do not find this rule controlling in the instant case. The question of how many courts of appeal judges hear an election suit is of

no interest to the parties involved in this litigation. It is an issue that does not affect the party litigants, but rather only the courts of appeal and the judicial branch. Therefore, the constitutionality of La. R.S. 18:1409 H is properly and timely raised in and by this court for the first time.

The fact that we have heard this election suit *en banc* does not mean that we agree that the legislature has the constitutional authority to adopt La.R.S. 18:1409 H. Rather, though this court is of the opinion that LA R.S. 18:1409 H is unconstitutional, judicial economy requires that we hear this suit *en banc* because, if the Louisiana Supreme Court rules that La. R.S. 18:1409 H is constitutional, the suit will have been heard as required by statute.

Therefore, for the above and foregoing reasons, I agree in the result reached by the trial court on the merits, and find La. R.S. 18:1409 H to be null and void as an unconstitutional infringement by the legislature into the powers of the judicial branch of government.

NUMBER 14,601

LAWRENCE REGIRA, ET ALS

VS.

RALPH FALSETTA, ET ALS

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

EDWARDS, J., concurs.

I agree with the concurring opinion of Judge Lottinger. Additionally, the folly of requiring all appellate judges to hear every election case needs to be pointed out.

Next year, this court will likely consist of twelve judges. The Supreme Court consists of seven justices. Twenty judges (one trial, twelve intermediate, and seven supreme) do not need to hear every election case in Louisiana.

This court, by rule, has handled the problems of delay caused by re-argument by having all election cases heard by a five-judge panel.

Appendix C

NUMBER 29,053

LAWRENCE REGIRA, ET ALS

VS.

RALPH FALSETTA, ET ALS

23RD JUDICIAL DISTRICT COURT

PARISH OF ASCENSION

STATE OF LOUISIANA

JUDGMENT:

This is an election contest in which plaintiffs assert constitutional grounds for challenging the alleged election of defendant Ralph Falsetta, as Mayor, City of Donaldsonville, pursuant to a primary election held April 4, 1981. Falsetta and certain state officials assert and proclaim Falsetta's election although no candidate in the primary obtained a majority vote and no general election has been held to fill the office for the ensuing term commencing July 1, 1981.

Four candidates participated in the primary election, receiving votes as follows: Lawrence "LaLa" Regira, incumbent and candidate for re-election 1299; defendant Ralph Falsetta 1040; Glynn "Sonny" Long 670; and, Dr. D.C. Foti 454. Falsetta and Regira were accordingly certified to participate in a general or run-off election to be held May 16, 1981. On May 2, 1981, the incumbent, Regira, died, leaving Falsetta as the unopposed candidate in the pending general election. Following Regira's demise, Falsetta has claimed election which claim has been confirmed by the Hon. James Brown,

Secretary of State, State of Louisiana, who, pursuant to LA-R.S. 18:512B has issued ballots for the general election listing no candidates for the office in question. By letter dated May 11, 1981, the Secretary of State has indicated his intent to certify to the Governor, within 30 days of the scheduled general election, the name of defendant Falsetta as elected Mayor by the people pursuant to LA-R.S. 18:512B, for the ensuing term commencing July 1, 1981.

Plaintiffs Lawrence Regira, Jr., Mrs. Lawrence Regira, Dennis Burns, Janet Regira Burns, Wilbert Huey, Mildred Dorsey, Dorothy M. Williams, Robert Johnson, William E. LeBlanc, Michael McKinney, Vic Marcello, Emerson Taylor, Lawrence Chatman, Jr., Delores Wright, Eunice Mumford, Mary Agnes Dorsey, Stanford Knockum and Vincent "Cy" Tortorich, assert a class action which was abandoned at the start of the trial. Alternatively, they appear in their individual capacities as residents of Donaldsonville and registered voters qualified to vote for the office of Mayor.

Named defendants are: (1) Ralph Falsetta; (2) The Hon. James Brown, Secretary of State, State of Louisiana; (3) The Board of Supervisors of Elections of Ascension Parish; (4) The Hon. William Guste, Attorney General, State of Louisiana, and (5) The Hon. David Treen, Governor of Louisiana.

Plaintiffs pray: (1) That the Secretary of State be restrained from certifying defendant Falsetta to be the elected Mayor of Donaldsonville; (2) That the Attorney General be served herein; (3) That a writ of quo warranto issue directing defendant Falsetta to show by what authority he claims the office of Mayor; (4) That prelimi-

nary and permanent injunctions issue restraining and prohibiting the Secretary of State, State of Louisiana, from declaring and certifying Falsetta to be Mayor of Donaldsonville; (5) That a writ of mandamus issue directing the Secretary of State to withhold certification of defendant Falsetta as the elected Mayor of Donaldsonville; (6) That mandamus issue directing Governor Treen to call a special election pursuant to law to fill the alleged vacancy in the office of Mayor of Donaldsonville; (7) That mandamus issue directing defendant Board of Election Supervisors to perform the duties incumbent upon for the conduct of the special election; (8) That declaratory judgment issue in favor of plaintiffs declaring LA-R.S. 18:512B unconstitutional; and, (9) That the request for preliminary and permanent injunctions be consolidated.

Plaintiffs challenge is based solely on the ground that Section 512B, above, pursuant to which the Secretary of State proposes to certify Falsetta as Mayor, is violative of the Fourteenth (due process and equal protection clauses) amendment to the United States Constitution, and Louisiana Constitution Article 1, Section 2 (due process), Section 3, (equal protection); and, Section 10 (the right to vote).

Plaintiffs argue that the constitutionally guaranteed right to vote is the cornerstone of our democracy and so vital to the continued existence of our form of government that any infringement or restriction thereof must be subjected to strictest scrutiny. It is also urged that any legislative regulation or restriction on this right must be predicated on a compelling interest embodied therein. According to plaintiffs, the nature of the election process is primarily the presentation of a choice to

the voters in every phase of the election procedure. To this end, plaintiffs argue, Louisiana has adopted a two election system of primary and general elections, thus eliminating the former antiquated system which frequently resulted in three elections when it became necessary to choose party candidates because a party candidate was not chosen in a first primary election.

Plaintiffs note that LA-R.S. 18:469 provides for reopening of qualification for office if a candidate dies before a primary election in that the statute provides:

> [A] When a person who qualified as candidate in a primary election for a public office dies after the close of the qualifying period and before the time for closing the polls on the day of the primary election, the qualifying period for candidates in the primary election for that office shall reopen for candidates on the day after the death and shall close at 5:00 p.m. on the third day after the death or, if that day is a legal holiday, at 5:00 p.m. on the next day which is not a legal holiday. The name of the deceased candidate shall not be printed on the primary election ballot. If the primary election ballot was printed with the deceased candidate's name on it, any votes received by the deceased candidate shall be void.
>
> LA-R.S. 18:469D pertinently states:
>
> D. Effect on primary elections. If the qualifying period for candidates reopens within thirty days before a primary election, all the votes cast in the primary election for that public office are void, unless the qualifying period opened and closed without additional candidates qualifying for that [the] office.[. . .] If all the votes cast in a primary election for a public office are void because of the death of a candidate, the primary election for the office shall

> be held on the date of the general election, and the general election for the office shall be held on the sixth Saturday after the primary election.

Plaintiffs note that LA-R.S. 18:512B, makes no similar provision for reopening qualifying time when a candidate participating in a general election dies or withdraws, but, instead, provides as follows:

> Election of unopposed candidates. *If* [,] *as a result of the death or withdrawal* of one or more candidates, *the number of candidates for an office in a general election does not exceed the number of persons to be elected to the office, the remaining candidates are declared elected by the people*, and their names shall not appear on the ballot in the general election. (Emphasis by the Court).

Plaintiffs maintain that Section 469, above, serves the best interests of the state and its electors by providing an orderly and economical election process in primary elections by establishing a procedure in which the electorate participates at every stage and establishes a reasonable and fair process which should logically apply to general elections as well. Section 512B, above, according to plaintiffs is fundamentally unfair, contrary to the principle of free and open elections and violative of the concept of majority rule in that it denies and infringes upon the right of the electorate to choose public officials. Plaintiffs place considerable stress upon the fact that more than two-thirds of those voting in the primary election here involved, did not vote for defendant Falsetta. Consequently, it is argued that if applied herein, Section 512B, above, vitiates the will of two-thirds of those voting in the primary, thus producing an unfair and unjust result.

Defendants have filed exceptions of no right and no cause of action alleging plaintiffs' lack of capacity to institute an individual action and asserting that as a matter of law no remedy is available to plaintiffs herein. Defendants also assert plaintiffs right to institute an action of quo warranto because plaintiffs are not claiming the office involved. A plea of prescription is also advanced on the provisions of LA-R.S. 18:512B. The Governor, Secretary of State, and Attorney General have filed an exception to the venue on the ground that proper venue after them is East Baton Rouge Parish.

On the merits, defendants allege that plaintiffs erroneously contend that the right to vote is the primary issue herein. Rather, according to defendants, the issue is simply the method of selection of candidates for office therefore the constitutional inquiry is reasonableness of legislative action, not the compelling interest criteria as contended by plaintiffs. Defendants also note that the burden of showing unreasonableness rests upon plaintiffs. Finally, defendants argue that subject statute is a valid exercise of legislative authority and discretion and therefore invulnerable to successful attack on constitutional grounds.

THE EXCEPTION OF VENUE

The court finds no merit in this exception. This is not an action against the Governor, Secretary of State and Attorney General or any combination of said officials alone. wthe suit is also against defendant Falsetta, a resident of Ascension Parish and the Board of Supervisors of Elections of Ascension Parish. The proper venue as against these later parties is Ascension Parish.

The court holds, therefore, that under the circumstances the Governor, Attorney General and Secretary of State, as indispensible parties to this action, are properly before the court.

THE EXCEPTIONS OF NO RIGHT AND NO CAUSE OF ACTION

In general the right to an individual action in an election contest suit is governed by LA-R.S. 18:1401C which states:

> C. A person in interest may bring an action contesting any election in which any proposition is submitted to the voters if he alleges that except for irregularities or fraud in the conduct of an election the result would have been different.

Notwithstanding the apparent restrictive scope of Section 1401C, above, our jurisprudence recognizes the right of a citizen, taxpayer and voter not a candidate for office, to challenge implementation of the election process. Baker Vs. Democratic Central Committee of Louisiana., 262 La. 1033, 266 So. 2d 199 (1970).

This court cannot conceive that the legislature intended to preclude the right of an interested voter to challenge the election process on constitutional grounds. Such legislation, in the view of this court would itself be unconstitutional. The court holds therefore that plaintiffs have, as individual taxpayers and voters, a right and cause of action herein.

PRESCRIPTION

Defendants maintain the action is prescribed because it was not instituted within five days of the date of

Regira's death. Pertinent are the provisions of LA-R.S. 18:1405B which states:

> B. An action contesting any election involving election to office shall be instituted within five days after the date of the election, and no such contest shall be declared moot because of the performance or nonperformance of a ministerial function, including but not limited to matters relating to the printing of ballots for the general election.

Plaintiffs reason that since Falsetta's alleged "election" is predicated on Section 512B, above, the "election" took place on May 2, 1981, the date of Regira's death, and this action having been brought May 12, 1981, is untimely.

The court rejects this argument upon finding that the intent of Section 512B, above, is apparently that the date of election envisioned therein is the date on which the Secretary of State certifies to the Governor the name of the surviving general election candidate within thirty days of the date of the scheduled general election. Since no such certification has yet been made, the prescriptive period has not commenced and therefore could not prescribe.

QUO WARRANTO

The purpose of a writ of quo warranto is to test ones authority to hold office or of an intruder's attempt to exercise the power and authority of an office. LA-R.S. 42:76; LA-CCP Article 3901. Lelong V Sutherland, 134 So. (2d) 627 (La. App. 4th Cir. 1961).

A party appearing solely in an individual capacity and not as claimant to public office has no standing to

invoke quo warranto proceedings. Small V Levy, 355 So.(2d) 643, La. App. 4th Cir. 1978), writ denied May 5, 1978. To the same effect see Lelong, above.

Since plaintiffs do not claim the office in question, the application for writ of quo warranto is denied.

CONSTITUTIONALITY

In support of the claim of unconstitutionality, plaintiffs cite numerous cases dealing with fundamental rights (due process and equal protection), in which area the United States Supreme Court has repeatedly held there can be no discrimination or distinction except that predicated upon some "compelling" state reason and that all statutes of this nature are held to strictest scrutiny to insure no such protected rights are violated. It is contended this same rule of interpretation applies to the fundamental right to vote. It is then argued that the legislature has recognized the fundamental nature of the right of franchise and right of the people to elect officials by providing in Section 469, above, that qualifying shall be reopened if a candidate dies within 30 days of the date of a primary election. To fully implement and preserve the franchise, it is argued that the same provision should apply to general elections. According to plaintiffs, Section 512B, is not only contrary to the legislatively expressed intent of our Election Code as a whole, but also offends on the stated constitutional grounds.

The court has read all of the authorities cited and find that while persuasive, in that they do indeed deal with the general principle that statutes dealing with fundamental rights will be strictly scrutinized and must pass the test of compelling state interest, they are not

controlling in that none are concerned expressly with the constitutional guarantee of the vote. For example, Smith V Allwright, 321 U.S. 649, 88 L. Ed 987, 64 S.Ct. 757 (1944), concerned denial of voting rights because of race; Kramer V Union Free School District No. 621, 23 L. Ed. 2d 583, 89 S.Ct. 1886 (1969) concerned laws requiring property twnerehip and parentage as qualifications for voting; Harper V Virginia Board of Elections 383 U.S. 663, 16 L. 2d 169, 86 S.Ct. 1079 (1966), declared invalid a poll tax requirement; and Cipriano V Houma 395 U.S. 701, 23 L. Ed. 2d 647, 89 S. Ct. 1897 (1969), declared invalid a property taxpayer requirement as a voter qualification.

No authority has been cited in support of plaintiff's contention that subject statute infringes upon the right to vote as guaranteed in Article 1, Section 10 of the Louisiana Constitution. That is, no authority directly in point, has been cited on the issue and this court has been unable to find such a precedent.

In contending that the issue here is candidate selection, and not the right to vote as contended by plaintiffs, defendants rely primarily upon the provisions of our Election Code and Fortson V. Morris, 385 U.S. 231, 17 L. Ed. 2d 330, 87 S.Ct. 446 (1966), which involved a constitutional assault on provision of the Georgia Constitution whereby the Governor of that state should be selected by majority vote in a general election and alternatively, by the state's legislature choosing between the two candidates having the most votes in the event no candidate received a majority vote. The Supreme Court held that while election by majority vote is preferred, the alternative method provided by the Georgia Constitution was not invalid and noted:

> It set up two ways to select the Governor. The first and preferred one, was election by a majority of the people; the second, and alternative one, was election by the State Assembly if any one candidate failed to receive a majority of the popular vote. Under the second method, in the legislative election the votes of the people were not to be disregarded but the State Assembly was to consider them as in effect nominating votes and to limit itself to choosing between the two persons on whom the people had bestowed the highest number of votes. There is no provision of the United States Constitution or any of its amendments which either expressly or impliedly dictates the method a State must use to select its Governor. A method which would be valid if initially employed is equally valid when employed as an alternative. It would be surprising to conclude that, after a state has already held two primaries and one general election to try to elect by a majority, the United States Constitution compels it to continue to hold elections in a futile effort to obtain a majority for some particular candidate.

Fortson, above, noted that Mississippi and Vermont also provide for election of their Governors in the same manner as Georgia. The decision also noted that 38 states provide for gubernatorial election by plurality vote and that in case of a tie the legislature shall elect. Fortson, above, concluded that the Georgia Constitutional provision did not violate the equal protection clause of the Federal Constitution.

Gordon vs. Lance, 403 U.S. 1, 29 L. Ed. 2d 273, 91 S. Ct. 1889 (1971), followed Fortson, above, and held that a West Virginia provision requiring sixty percent voter approval of a referendum to incur bonded indebtedness or increase tax rates, did not offend constitutional re-

quirements of the fourteenth amendment. In so holding, the Court observed:

> Although West Virginia has not denied any group access to the ballot, it has indeed made it more difficult for some kinds of governmental actions to be taken. Certainly any departure from strict majority rule gives disproportionate power to the minority. But there is nothing in the language of the Constitution, our history, or our cases that requires that a majority always prevail on every issue. On the contrary, while we have recognized that state officials are normally chosen by a vote of the majority of the electorate, we have found no constitutional barrier to the selection of a Governor by a state legislature, after no candidate received a majority of the popular vote. Fortson V Morris, 385 U.S. 231, 17 L. Ed. 2d 330, 87 S. Ct. 446 (1966).

In this instance the statute does not result in unequal protection under law in that some class of voters is discriminated against because of race, poll tax requirement, property ownership or residential requirement. All persons have the right to vote in every election held pursuant to the Louisiana Election Code.

Nor does the court find any infringement, erosion or denial of the right to vote as contemplated by the appropriate provisions of the constitutions of the United States or this state.

The Election Code provides for a single primary followed by a general election in the event no candidate receives a majority vote in the primary. The required primary has been held in this instance with results necessitating a general election which was properly called. Unfortunately, one of the two candidates entitled

to participate in the general election, died before the election was held.

The very nature of elections demand that they be conducted expeditiously with the view of achieving earliest possible finality commensurate with due process of law requirements. The orderly conduct of governmental affairs requires that official succession to public office be determined, when possible and practicable, prior to commencement of the term for which the election is held.

LA-RS 18:1432A provides the remedies which may be ordered in an election contest. It provides that upon finding an election void for reasons authorized therein:

> —the judge may render a final judgment declaring the election void and ordering a new primary or general election for all the candidates, or, if the judge determines that the appropriate remedy is the calling of a restricted election, the judge may render a final judgment ordering a new election and specifying the date of the election, the appropriate candidates for the election, and the office or other position for which the election shall be held.

Statutes are presumed constitutional and the party alleging unconstitutionality bears the burden of proof. Buras vs. Orleans Parish Democratic Executive Committee, 248 La. 203, 177 So. 2d 576 (La. 1965).

It is the duty of the court to uphold constitutionality of a statute whenever possible and every consideration of public need and policy upon which the legislature could rationally have based the statute should be weighed by the court and, if the statute is not clearly arbitrary, unreasonable and capricious it should be up-

held as valid. State vs. Rones, 223 La. 839, 67 So. 2d 99 [1953].

Any doubt concerning alleged unconstitutionality of a statute must be resolved in favor of its validity. Johnson vs. Collector of Revenue, 246 La. 540, 165 So. 2d 466 [1964].

Application of plaintiff's position to the facts of this case would produce interesting alternative solutions. The election in question is a general election, not a primary. Defendant Falsetta survived the primary and was entitled to participate in the general election. If a new general election is held, surely Falsetta would be entitled to participate. How would his opponent be selected? Should he face the candidate having the third highest vote in the primary? If so, suppose this candidate declined to run in the general election. Should Falsetta's opponent then be the candidate receiving the fourth highest vote in the primary or should a new primary election be called? If a new primary were ordered delays could be encountered therein by the death or withdrawal of a candidate, thus delaying the general election. If a general election were ordered the death of a candidate before that election were held, would place matters in the same position as presently exists. This court believes that such eventualities are neither reasonable, practicable nor expeditious.